A

Seah Ah Chiew v Public Prosecutor

B HIGH COURT (IPOH) — CRIMINAL REVISION NO 43–24 OF 2005
VT SINGHAM J
5 DECEMBER 2005

C *Criminal Law — Dangerous Drugs Act 1952 — Section 15(1)(a) — Discretion to the court to either sentence the offender to a fine or to imprisonment — Magistrate sentenced accused to both — Whether sentence illegal*

D *Criminal Procedure — Revision — Revisionary power of High Court — Plea of guilty — Whether accused understood the nature of her plea — Whether her plea was with qualification*

E *Criminal Procedure — Sentence — Order of police supervision — Accused not informed and served a copy of the supervision order — Duty of magistrate to act with utmost care and accuracy — Essential that the accused know at the outset the precise terms and conditions imposed in the supervision order*

F The applicant ('the accused') was charged under s 15(1)(a) Dangerous Drugs Act 1952 (1952 Act), was unrepresented and pleaded guilty on the same day she was charged. The learned magistrate convicted and sentenced her to three days imprisonment and to a fine of RM2,000 in default two weeks imprisonment and from the notes of proceedings also ordered to undergo supervision for two years purported to be made under s 38B of the 1952 Act. The accused had not only paid the fine of RM2,000 but had also served the sentence of three days imprisonment as G imposed by the learned magistrate. The accused was not satisfied with the supervision order as she was not informed and served a copy of the supervision order and was also not informed of the conditions contained therein by the learned magistrate on 1 August 2005, the date when she was found guilty, convicted and sentenced. This court found serious defects and flaws in the whole proceedings at the H magistrate's court and the supervision order issued by the learned magistrate and fixed a date for revision.

Held, conviction against the accused is quashed:

I (1) As for the conviction against the accused, the accused had informed the learned magistrate that she had only consumed beer on the alleged date and is a diabetic and that she was taking medical treatment which infact provides her with a statutory defence if it is found that she had infact administered to herself the said alleged dangerous drug which she had disputed (see paras 7 & 9).

(2) At the point when the accused stated that she had consumed only beer and that she was a diabetic and receiving medical treatment, it should have been clear to the learned magistrate that the accused did not understand the nature of her plea, neither did she intend to admit without qualification the offence alleged against her. The learned magistrate therefore should have rejected the accused's plea of guilty and recorded a plea of not guilty and set down the case for hearing on the ground that her plea was qualified (see para 11).

(3) Further, it is also the duty of the learned magistrate to inform the accused at the time of recording the plea of guilty that upon conviction and the sentence to be imposed as provided by law, the accused has to also undergo a supervision with a rehabilitation officer or any police officer for a period not exceeding three years immediately after having undergone the punishment imposed upon her in respect of the offence as the supervision order under s 38B of the 1952 Act which is mandatory. The learned magistrate must explain to the accused the full consequences of her plea of guilty especially when the accused was not represented by counsel at the material time. Unfortunately, it is not shown in the record of proceedings that this mandatory provision was explained to the accused (see para 17).

(4) Section 15(1)(a) of the 1952 Act provides the discretion to the court to either sentence the offender to a fine or to imprisonment and not both. However, the record of proceedings from the magistrate's court shows that the learned magistrate had sentenced the accused to both imprisonment and fine when the punishable section gives the discretion to the court to pass a sentence of either imprisonment or to a fine and not to both. Therefore, the sentence is illegal and not in accordance to law (see para 20).

(5) The supervision order which was issued by the learned magistrate on 1 August 2005 should contain both the dates, being the date of commencement and the date of completion of the supervision for reasons first, the conditions contained in the said supervision order has a restraining effect on the offender, in the instant case, against the accused as her liberty is restricted and secondly, the said supervision order which does not contain the dates for the period of two years would result in practical difficulties for the officer to enforce the order and for the accused to strictly comply, and thirdly, it leaves it open to debate, challenge and several interpretation (see para 25).

(6) The learned magistrate seemed to have been confused, failed to consider and distinguish the supervision order made under s 6(1)(b) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (1983 Act) which is discretionary and is issued to a person who is found to be a drug dependant as defined under s 2(1) of the 1983 Act and the supervision order made under s 38B(1) of the 1952 Act which is mandatory and is a consequential order where an accused is found guilty of an offence under s 15(1)(a) of the 1952 Act. The said supervision order which was issued in accordance with the statutory Form 4 under s 6(1)(b) of 1983 Act has become worthless as it did not contain proper and correct information with certainty and it provided the accused with the wrong information (see para 28).

(7) It is important to state and emphasize that it is the duty of the learned magistrate to act with utmost care and accuracy and with a judicial mind so as to afford the person who is ordered to undergo the supervision order under s 38B(1) of the 1952 Act the full rights to which she is entitled especially where the said order is something affecting her liberty and there ought to be careful consideration to examine the conditions of the order which has some restraint on her liberty. It is also essential and the accused is entitled to know at the outset and at the time when the supervision order is issued upon the conviction under s 15(1)(a) of the 1952 Act the precise terms and conditions imposed upon her where it affects her liberty as contained in the supervision order and not to order in stock form as in the instant case 'over the rubber stamp' as this is 'undesirable in any judicial proceedings, and most particularly undesirable in proceedings of this nature, as in the instant case, where the liberty and reputation of the subject is involved and in which, consequently, particular individual attention must, as a matter of right, be given to every relevant factor' (see para 30).

(8) Accordingly, this court had to intervene and set aside the conviction, sentence and the supervision order in exercise of its revisionary powers provided to this court. The conviction against the accused is quashed, the sentence imposed by the learned magistrate is set aside and the fine paid be refunded to the accused and the supervision order dated 1 August 2005 is also set aside and cancelled. On the facts and circumstances of this case, it is not fair for the accused to face another judicial proceeding and there is no order for retrial (see para 38).

[Bahasa Malaysia summary

Pemohon ('tertuduh') didakwa di bawah s 15(1)(a) Akta Dadah Berbahaya 1952 (Akta 1952), dan tidak diwakili dan telah mengaku bersalah pada hari yang sama beliau didakwa. Majistret yang bijaksana telah mensabitkan dan menghukum tertuduh ke tiga hari penjara dan didenda RM2,000 jika gagal dua minggu penjara dan dari nota-nota prosiding juga diperintahkan untuk menjalani pengawasan selama dua tahun yang kononnya dilakukan di bawah s 38B Akta 1952 tersebut. Tertuduh bukan sahaja telah membayar denda RM2,000 tersebut tetapi juga telah menjalani hukuman penjara tiga hari yang diberikan oleh majistret bijaksana tersebut. Tertuduh tidak berpuas hati dengan perintah pengawasan oleh kerana ia tidak dimaklumkan atau diserahkan sesalinan perintah pengawasan tersebut dan tidak diberitahu syarat-syarat yang terkandung di dalamnya oleh majistret yang bijaksana pada 1 Ogos 2005, tarikh dimana ia didapati bersalah, disabitkan dan dihukum. Mahkamah ini telah mendapati kecacatan yang serius dan ketidaksempurnaan dalam keseluruhan prosiding di mahkamah majistret dan perintah pengawasan yang dikeluarkan oleh majistret yang bijaksana tersebut dan telah menetapkan satu tarikh untuk penyemakan.

Diputuskan, sabitan terhadap tertuduh dibatalkan:

(1) Berhubung dengan sabitan terhadap tertuduh, tertuduh telah memberitahu majistret yang bijaksana bahawa dia hanya meminum bir pada tarikh yang

dikatakan itu dan merupakan seorang yang mengidap kencing manis dan bahawa dia sekarang sedang menerima rawatan perubatan yang sebenarnya memberikannya satu pembelaan statutori sekiranya ia telah memberikan dirinya sendiri dadah berbahaya yang dikatakan itu yang mana dipertikaikannya (lihat perenggan 7 & 9).

(2) Apabila tertuduh menyatakan bahawa dia hanya meminum bir dan bahawa dia seorang yang mengidap kencing manis dan sedang menerima rawatan perubatan, ia sepatutnya jelas kepada majistret yang bijaksana bahawa tertuduh tidak faham akan sifat pengakuannya, dan juga dia tidak berniat untuk mengaku tanpa bersyarat tuduhan terhadapnya tersebut. Majistret yang bijaksana sepatutnya menolak pengakuan tertuduh dan merekodkan pengakuan tidak bersalah dan meletakkan kes ini untuk pendengaran atas alasan bahawa pengakuan tertuduh adalah dengan bersyarat (lihat perenggan 11).

(3) Lanjutan, adalah juga tugas majistret yang bijaksana untuk memberitahu tertuduh pada masa pengakuannya direkodkan bahawa setelah disabitkan dan penghukuman yang akan dikenakan seperti yang diperuntukkan di bawah undang-undang, tertuduh juga terpaksa menjalani pengawasan dengan seorang pegawai pemulihan atau sebarang pegawai polis tidak melebihi jangkamasa tiga tahun selepas sahaja beliau menjalankan hukuman yang diberikan kepadanya berhubungan dengan tuduhan tersebut oleh kerana perintah pengawasan di bawah s 38B Akta 1952 adalah mandatori. Majistret yang bijaksana mesti menerangkan kepada tertuduh akibat sepenuhnya pengakuan salahnya terutama sekali apabila tertuduh tidak diwakili oleh peguambela pada masa yang material tersebut. Malangnya, ia tidak di dalam rekod prosiding bahawa peruntukan mandatori ini diterangkan kepada tertuduh (lihat perenggan 17).

(4) Seksyen 15(1)(a) Akta 1952 tersebut memberikan budi bicara kepada mahkamah ini samada untuk menghukumkan pesalah dengan denda atau penjara tetapi bukan kedua-duanya. Akan tetapi, dari rekod prosiding daripada mahkamah majistret menunjukkan bahawa majistret yang bijaksana telah menghukumkan tertuduh kepada kedua-dua penjara dan denda apabila penghukuman seksyen tersebut memberi budi bicara kepada mahkamah untuk menghukumkan tertuduh dengan denda atau penjara tetapi bukan kedua-duanya. Dengan itu penghukuman tersebut adalah salah dari segi undang-undang (lihat perenggan 20).

(5) Perintah pengawasan yang dikeluarkan oleh majistret yang bijaksana pada 1 Ogos 2005 sepatutnya mengandungi tarikh-tarikh, iaitu tarikh bermula dan tarikh berakhir pengawasan tersebut atas sebab pertama, syarat-syarat yang terkandung di dalam perintah pengawasan tersebut mempunyai efek tahanan terhadap pesalah, dalam kes ini, terhadap tertuduh oleh kerana kebebasannya dihadkan dan keduanya, perintah pengawasan yang tidak mengandungi tarikh-tarikh untuk jangkamasa dua tahun akan menyebabkan kesusahan praktikal terhadap pegawai yang melaksanakan perintah tersebut dan untuk tertuduh menurutinya dan ketiga, ia terbuka untuk didebatkan, dicabar dan beberapa tafsiran (lihat perenggan 25).

A (6) Majistret yang bijaksana nampaknya telah keliru, gagal untuk menimbang dan membezakan perintah pengawasan yang dibuat di bawah s 6(1)(b) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 (Akta 1983) yang berdasarkan budi bicara dan dikeluarkan terhadap seseorang yang telah didapati seorang penagih dadah seperti yang ditafsirkan di bawah s 2(1) Akta 1983 tersebut dan B perintah pengawasan yang dikeluarkan di bawah s 38B(1) Akta 1952 tersebut adalah mandatori dan merupakan perintah sampingan dimana tertuduh didapati bersalah atas kesalahan di bawah s 15(1)(a) Akta 1952 tersebut. Perintah pengawasan yang dikeluarkan mengikuti Borang 4 statutori di bawah s 6(1)(b) Akta 1983 tersebut adalah tidak bernilai oleh kerana ia tidak mengandungi maklumat yang betul dan tepat yang pasti tetapi ia C membekalkan tertuduh dengan maklumat yang salah (lihat perenggan 28).

(7) Adalah penting untuk menyatakan dan ditekan bahawa adalah merupakan kewajipan majistret yang bijaksana untuk bertindak dengan ketelitian yang tinggi dan tepat dan dengan minda kehakiman supaya ia dapat memberikan seseorang yang diperintahkan menjalani pengawasan di bawah s 38B(1) Akta D 1952 tersebut hak yang sepenuhnya yang dia berhak terutama sekali apabila perintah tersebut adalah sesuatu yang menjejaskan kebebasannya dan sepatutnya terdapat pertimbangan yang berjaga-jaga dalam meneliti syarat-syarat perintah yang akan menghadkan kebebasannya. Adalah juga penting bahawa tertuduh berhak mengetahui dari awal lagi dan ketika perintah E pengawasan diberikan selepas sabitan di bawah s 15(1)(a) Akta 1952 tersebut terma-terma dan syarat-syarat yang dikenakan terhadapnya yang akan menjejaskan kebebasannya secara terperinci yang terkandung di dalam perintah pengawasan tersebut dan bukannya untuk menempah untuk diedarkan borang seperti dalam kes ini *'over the rubber stamp'* oleh kerana ini adalah *'undesirable in any judicial proceedings, and most particularly undesirable* F *in proceedings of this nature, as in the instant case, where the liberty and reputation of the subject is involved and in which, consequently, particular individual attention must, as a matter of right, be given to every relevant factor'* (lihat perenggan 30).

G (8) Dengan itu, mahkamah terpaksa campurtangan dan mengetepikan sabitan, penghukuman dan perintah pengawasan tersebut dalam melaksanakan kuasa-kuasa semakannya yang diberikan kepada mahkamah ini. Sabitan terhadap tertuduh dibatalkan, hukuman yang diberikan oleh majistret yang bijaksana diketepikan dan denda yang dibayar dikembalikan kepada tertuduh dan perintah pengawasan bertarikh 1 Ogos 2005 juga diketepikan H dan dibatalkan. Atas fakta-fakta dan keadaan kes ini, adalah tidak adil untuk tertuduh menghadapi sekali lagi prosiding kehakiman dengan itu tiada perintah untuk perbicaraan semula (lihat perenggan 38).]

Notes

I For cases on s 15(a) Dangerous Drug Act 1952, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) para 157

For cases on revisionary power of high court, see 5(1)*Mallal's Digest* (4th Ed, 2004 Reissue) paras 2998–3015.

For cases on order of police supervision, see 5(1)*Mallal's Digest* (4th Ed, 2004 Reissue) paras 3654–3656.

Cases referred to

Abdul Kadir bin Abdul Rahman v PP [1984] 1 MLJ 80 (folld)
Aw Yang Kee Chuan lwn Pendakwa Raya [1992] 2 CLJ 979 (folld)
Habib bin Hasan v Timbalan Menteri Dalam Negeri Kementerian Dalam Negeri, Malaysia dan Yang Lain-lain [2004] 6 MLJ 580 (folld)
Heng Kim Khoon v PP [1972] 1 MLJ 30 (folld)
Imtiaz Ahmad v Ghulamaliple [1963] SC 382 (refd)
Lau Eng Teck v PP [1965] 1 MLJ 34 (folld)
Lee Weng Tuck & Anor v PP [1989] 2 MLJ 143 (folld)
Mohamed Humayoon Shah [1874] 21 WR CO 72 (refd)
Mohammad Hassan v PP [1998] 5 MLJ 65 (folld)
Munandu v PP [1984] 2 MLJ 82 (folld)
Palan v PP [1932] MLJ 124 (refd)
Petrus a/k Belaka v PP [1998] 3 MLJ 894 (folld)
PP v Chan Kam Leong [1989] 1 MLJ 326 (refd)
PP v Chean Tin [1939] MLJ 266 (refd)
PP v Hettiarachigae LS Pereira [1977] 1 MLJ 12 (refd)
PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
PP v Leong Yoon Meow [1953] MLJ xxxv (refd)
PP v Mohamed Tarmizi [1985] 1 MLJ 219 (folld)
PP v Ng Hock Lai [1994] MLJU 251 (refd)
Re Roshidi bin Mohamed [1988] 2 MLJ 193 (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134 (refd)
Sivaraman Nair v Menteri Dalam Negeri, Malaysia & Anor [2000] 7 CLJ 140 (distd)
Tang Hee Hing v Public Prosecutor [1991] 1 MLJ 402 (folld)

Legislation referred to

Court of Judicature Act 1964 s 36
Criminal Procedure Code s 173(b)
Dangerous Drugs (Forms) Regulations 2001 Form 3
Dangerous Drugs Act 1952 ss 14(2), 15, 15(1)(a), 15A, 38B, 38B(1)
Drug Dependants (Treatment and Rehabilitation) Act 1983 ss 2(1), 6(1)(b), Form 4
Evidence Act 1950 s 114(e)
Interpretation Acts 1948 and 1967 (Act 388) s 62

Naran Singh (Naran Singh & Co) for the applicant
How May Ling (AG's Chambers) for the respondent

VT Singham J:

[1] In this case, the applicant (hereinafter referred to as 'the accused') who is 55 years old was charged at the magistrate's court, Ipoh on 1 August 2005 as follows:

> Bahawa kamu pada 1 Julai 2005, jam lebih kurang 1.30 pagi di Pusat Hiburan Titiwangsa, No 219 Jalan Sultan Idris Shah, Ipoh didalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan telah didapati memberikan kepada diri kamu sendiri dadah berbahaya iaitu, 3.4 Methylenedioxymethamphetamine MDMA, oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum dibawah s 15(l)(a) Akta Dadah Berbahaya 1952 (Akta 234).

A [2] The records obtained from the magistrate's court, Ipoh has disclosed that the accused who was unrepresented by counsel pleaded guilty on the same day she was charged in court on 1 August 2005. The learned magistrate found the accused guilty, convicted and sentenced her to three days imprisonment and to a fine of RM2,000 in default two weeks' imprisonment. Infact, the notes of proceedings as recorded by
B the learned magistrate on the sentence of imprisonment states that the accused was sentenced to three days imprisonment whereas the letter dated 1 Augusat 2005 addressed to the Agency Dadah Kebangsaan Negeri Perak, Ipoh by the learned magistrate states under the colomn sentence that the accused was sentenced to seven days imprisonment and to a fine of RM2,000 in default two weeks' imprisonment and ordered to undergo supervision for two years purported to be under s 38B of the
C Dangerous Drugs Act 1952. Infact it is stated in the supervision order dated 1 August 2005 issued by the learned magistrate and the letter dated 1 August 2005 addressed to the Agency Dadah Kebangsaan Negeri Perak that the supervision order is made under s 6(l)(b) of the Drug Dependants (Treatment and Rehabilitation) Act 1983.

D [3] The accused had not only paid the fine of RM2,000 but had also served the sentence of three days imprisonment as imposed by the learned magistrate. The accused however who is 55 years old did not undergo the supervision as ordered by the learned magistrate on 1 August 2005 immediately after having served the three days imprisonment imposed upon her and released from prison on 3 August 2005 as
E first, she was not served with the supervision order, secondly, she was not informed as to when the supervision is to commence, thirdly, she was not informed where and to whom she had to report after having served the sentence of three days imprisonment and fourthly, she was not even informed of the terms and conditions of the supervision order. The accused informed this court that it was only about a few
F days before 30 September 2005 when she was informed of the supervision order and that she had to undergo supervision. She started to undergo supervision as from 30 September 2005 but she was not informed when the supervision will cease or the date when the supervision order will expire. Neither was the supervision order served on her or explained to her.

G [4] However, as the accused was not satisfied with the supervision order she lodged a complaint to the Rt Hon Chief Justice, Malaysia by a letter dated 26 September 2005 through the People's Progressive Party of Malaysia that she was not informed and served a copy of the supervision order and was also not informed of the conditions contained therein by the learned magistrate on 1 August 2005, the date
H when she was found guilty, convicted and sentenced. A copy of the said letter of complaint was forwarded to this court on the instructions of the Rt Hon Chief Justice for the necessary action to be taken by this court by letter dated 7 October 2005 by the Chief Register of the Federal Court. This court then called for the records from the Magistrate's Court, Ipoh for this court to be satisfied as to the
I correctness, legality and propriety of the supervision order. Upon perusal of the records, this court found serious defects and flaws in the whole proceedings at the magistrate's court and the supervision order issued by the learned magistrate and fixed a date for revision on 27 October 2005. By letter dated 12 October 2005 the deputy public prosecutor and the accused were requested to attend this court for the revision proceedings.

[5] On 27 October 2005, when the revision proceedings came up for hearing, the accused was represented by counsel Dr Naran Singh who informed the court that he had just recently been instructed by the accused to represent her in the revision proceedings. As learned counsel required more time to prepare his submissions in the event this court were to invite both the counsel and deputy public prosecutor to address and assist this court in arriving at a just decision, learned counsel applied for a short adjournment. As the learned deputy public prosecutor had no objection to fix another date, the proceedings were adjourned to 22 November 2005.

[6] On 22 November 2005, having heard both the learned counsel for the accused and learned deputy public prosecutor at the invitation of this court pursuant to s 36 of the Court of Judicature Act 1964, the decision was reserved to 5 December 2005 to consider the complaints raised by learned counsel for the accused against the conviction, sentence and the supervision order.

DECISION

Conviction

[7] As for the conviction against the accused, this court found the following flaws and that the accused who was unrepresented by counsel at the lower court had infact made a qualified plea of guilty by stating that:

(1) she had only consumed beer on the alleged date, time and place during a birthday celebration;

(2) she was a diabetic and was taking medical treatment;

(3) she has no connection or relationship with the other customers who were also arrested at the night club on the same date and time as she was with her family members and her husband when the police carried out raid at the night club;

(4) the charge states that the accused committed the offence on 1 July 2005 whereas the Drug and Research Laboratory report dated 17 July 2005 from the Pathology Department, Hospital Kuala Lumpur states that the urine was collected/taken from the accused on 4 July 2005 whereas the charge states that the accused was found to have administered to herself the dangerous drugs on 1 July 2005.

(5) Section 15(1)(a) of the Dangerous Drugs Act 1952 as amended on 1 November 2002 states:

> (a) Any person who:- consumes administers to himself or suffers any other person, contrary to the provisions of s 14 to administer to him any dangerous drug specified in Parts III and IV of the First Schedule;
>
> shall be guilty of an offence against this Act and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years.

[8] This court is of the view that if the accused was seen to have self administered the alleged drug on 1 July 2005 as stated in the charge, it is only prudent and

reasonable to have taken sample of her urine immediately upon arrest on 1 July 2005 and not about three days later on 4 July 2005 as stated in the said Drug and Research Laboratory report, Pathology Department, Hospital Kuala Lumpur. In the instant case, there was no evidence or facts to support the charge as conceded by the learned deputy public prosecutor that the drug namely Methylenedioxymethamphetamine was found in her urine on 1 July 2005 which lend weight to support the accused's plea in mitigation that she had consumed only beer on the alleged date, time and place. (See *Public Prosecutor v Chan Kam Leong* [1989] 1 MLJ 326) (Pre amendment case of s 15 of the 1952 Act). On this score alone, and despite the fact that the accused who was unrepresented by counsel in the lower court had pleaded guilty to the charge, the conviction cannot be sustained where the plea of guilty was qualified and it was not founded on the facts or evidence which did not support the charge. An accused may not know that she cannot plead guilty to a charge where it does not disclose an offence and is contradicted by the documents tendered by the prosecution itself to support the charge in the instant case, the report dated 17 July 2005 from the Drug and Research Laboratory, Pathology Department, Hospital Kuala Lumpur. Consequently, the learned magistrate should have rejected the plea of guilty.

[9] It is also interesting to note that the accused had informed the learned magistrate that she is a diabetic and that she was taking medical treatment which infact provides her with a statutory defence if it is found that she had infact administered to herself the said alleged dangerous drug which she had disputed. Further, if the dangerous drug was administered to herself by or under the directions of a registered medical practitioner or a registered dentist or a medical or dental officer as provided under s 14(2) of the Dangerous Drugs Act 1952, the administration of the said dangerous drug is deemed lawful.

[10] Section 14(2) of the said act states:

> Nothing in this section shall be deemed to render unlawful the administration of any such drug by or under the directions of a registered medical practitioner or a registered dentist or a medical or dental officer of any visiting force lawfully present in Malaysia who is resident, in Malaysia on full pay and acting in the course of his duty.

Mitigation Plea

[11] In considering the mitigation plea as raised by the accused that she had only consumed beer on the alleged time, date and place, it is clear that it was a qualified plea and the accused had disputed an essential ingredient constituting the offence as per the charge i.e. that she had administered to herself the said drug and the Drug and Research Laboratory Report dated 17 July 2005 too does not seem to support the charge. The learned magistrate therefore should have rejected the accused's plea of guilty and recorded a plea of not guilty and set down the case for hearing on the ground that her plea was qualified and the said Drug and Research Laboratory Report does not support the charge.

[12] In *Heng Kim Khoon v Public Prosecutor* [1972] 1 MLJ 30 at p 31, His Lordship Sharma J said:

The charges were read over and according to the record they were explained to and understood by the accused and he pleaded guilty thereto. He admitted the facts but in mitigation stated that the exhibits were not his and that they had been left behind by a friend of his. Proof of 'possession' was the very essential ingredient of those offences and in spite of what the accused said the learned president found him guilty and convicted him on the two charges. A plea of guilty may be accepted by the court and the accused convicted on it but the court is not bound to accept a plea of guilty in all cases. The court must carefully consider whether the accused has fully understood the nature of the charge to which he pleads guilty. The accused is not to be taken at his word when he pleads guilty unless the plea is expressed in unmistakeable terms with full appreciation of the essential ingredients of the offence. This rule of law is applied with all the greater stringency when the offence charged is complicated or serious.

In the instant case, the question of possession was involved which can sometimes be a very difficult question. In taking down a plea of guilty the use of the set formula:

> Charge read over and explained to the accused and understood by him. Pleads guilty. Understands the nature and consequences of his plea. Plea accepted.

should not be the result of sheer wont and habit as if it was an empty and meaningless ritual which the pen irresistibly begins to perform and complete once the magic words "I plead guilty" are uttered by the accused. The taking down of a plea of guilty is a solemn and serious act and the magistrates should devote some time and active thought before they decide to accept that plea and base a conviction thereon.

In the case of *Christopher Ingleson* the accused was convicted of horse stealing on his plea of guilty. He handed up a statement which stated that he did not know that the horses were stolen. Lord Coleridge J. in his judgment said:

> He pleaded guilty and handed up a statement to the recorder which, if believed, was a complete exculpation: it ended with the words, 7 am guilty of taking the horses not knowing that they were stolen.' If the recorder read that it was clearly his duty to explain to the prisoner that his proper course was to plead not guilty, and to have such a plea entered. We presume the recorder did not read to the end of the statement. It is most important that a prisoner should not be caught by a phrase like 'guilty'; clearly he meant that he had had no felonious intent.

Again in the case of *Alfred Golathan*, Reading L.C.J. said:

> It appears to be quite plain from reading the shorthand note that at the most he admitted entering the premises, but added that he did not do so for the purpose of stealing. That unfortunately was taken as a plea of guilty, and he was thereupon sentenced to a long term of penal servitude In our view this man's plea was not a plea of guilty at all, and no man is to be convicted on a plea which is ambiguous. If there is any ambiguity it is to be taken as a plea of not guilty, and evidence given against him in the ordinary course. He must not be taken to have admitted his guilt unless he does so in unmistakeable terms.

In Malacca Criminal Revision No 4 of 1970, I had occasioned to say:

> I like to add that when an accused person pleads guilty it is the duty of the learned magistrate to carefully consider whether the accused fully understands the nature of the

charge to which he pleads guilty. A plea of guilty, as has been said, must be received with caution and generally the court should satisfy itself by putting questions to the accused in order to see whether he is aware of the facts on which the charge is founded against him and also whether he admits his guilt voluntarily without any extraneous pressure or expectation of a lesser sentence. An accused does not plead to a section of a criminal statute. He pleads guilty or not guilty to the facts alleged in the charge which in law are said to disclose an offence under the section named in the charge... It is the duty of the appellate court to see that the accused had not pleaded guilty on a misconception of law or that his conviction was not founded on such evidence which did not or could not constitute the offence under the charge.

A plea of guilty only amounts to an admission that the accused committed the acts alleged against him and not an admission of the guilt under a particular section of the Act. If he pleads guilty under an erroneous view of the law his conviction cannot stand. In such a case the plea of guilty does not avail because he cannot be said to have committed the offence in question in the eyes of the law. (See *Abdul Kadir bin Abdul Rahman v Public Prosecutor* [1984] 1 MLJ 80].

[13] Section 173(b) of the Criminal Procedure Code has laid down the procedure to record a plea of guilty. Section 173(b) of the Criminal Procedure Code states as follows:

Procedure in summary trials

(b) If the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded and he may be convicted on it and the Court shall pass sentence according to law:

Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

[14] In *Mohammad Hassan v Public Prosecutor* [1998] 5 MLJ 65 pp 71–74, His Lordship Augustine Paul JC (now Federal Court Judge) said:

(a) The Court must ensure that it is the accused himself who wishes to plead guilty;

(b) The Court must ascertain that the accused understands the nature and consequences of his plea;

(c) The Court must ascertain that the accused intends to admit without qualification the offence alleged against him.

(i) The three safeguards will now be considered in some detail.

A plea must in all cases be made by the accused personally irrespective of whether he is unrepresented or represented by counsel. In *R v Tan Thian Chai* [1932] MLJ 74 HC it was held that an accused person should plead guilty or claim trial by his own mouth and not through his counsel or advocate (see also *Abdul Kadir bin Abdul Rahman v PP* [1984] 1 MLJ 80 HC). Even in cases where evidence had been recorded after the accused had claimed trial and he subsequently wishes to change his plea the accused must be asked to plead to the charge himself and not through his counsel (see *Mahmood Ali v PP* [1964] MLJ 57 HC).

The only exception is where the charge is preferred under a statute which expressly allows the accused to plead guilty by letter (see PP v Leng Chow Teng [1985] 1 MLJ 229 FC).

(ii) The accused must understand the nature and consequences of his plea.

As a matter of practice whether an accused person pleads guilty or not it should always be clear in the record that the charge had been read, explained and understood and that if the plea is one of guilty it should also be made clear in the record that the accused understands the nature and consequences of his plea (see *Chin Ban Keat v R* [1949] MLJ 297 HC; *Chua Ah Can v PP* [1958] MLJ liv HC; *Subramaniam & Anor. v. PP* [1976] 1 MLJ 76 HC). Where an accused pleads guilty the court should record in writing just what the accused said in answer to the charge (see *Lee Yu Fah & Ors v PP* [1937] MLJ 179 HC). The court must consider whether it is safe to accept the plea. The court can do that, firstly, by considering each and every ingredient of the charge; secondly, by satisfying itself by questioning the accused whether he really understands the charge and intends to admit without qualification each and every ingredient that constitutes it; and finally, that he clearly understands the nature and consequences of his plea (see *Chen Chong & Ors v PP* [1967] 2 MLJ 130 HC). The record must show that the court ascertained that the accused understood the nature and consequences of his plea (see *PP v Tengku Hitam* [1962] MLJ 414 HC). In this regard I refer to *Hassan bin Dollah v. PP* [1996] 5 MLJ 285 where Roberts CJ said at p 291

In *Heng Kim Khoon v Public Prosecutor* [1972] 1 MLJ 30, Sharma J referred, while emphasising the need to be careful before accepting a plea, to the use of the following formula - charge read over and explained to the accused and understood by him. Pleads guilty. Understands the nature and consequences of his plea.

I see nothing wrong in something of this nature appearing in the record. If it does, it should be presumed that the magistrate did explain to the defendant the nature and consequences of the plea of guilty which he had made.

There is no set formula. It is sufficient if the record shows that the defendant does understand the nature and consequences of his plea and that this has been explained to him by the magistrate.

The presumption that Roberts CJ is referring to is found in s 114(e) of the Evidence Act 1950 which provides that the court may presume that judicial and official acts have been regularly performed. The onus is on the accused to rebut this presumption if he so desires.

(iii) The accused must admit the offence alleged against him without qualification.

A plea of guilty only amounts to an admission that the accused committed the acts alleged against him and not an admission of the guilt under a particular section of the act. If he pleads guilty under an erroneous view of the law his conviction cannot stand. In such a case the plea of guilty does not avail because he cannot be said to have committed the offence in question in the eyes of the law (see *Heng Kim Khoon v Public Prosecutor* [1972] 1 MLJ 30 HC). A plea of guilty to an offence unknown to the law is no plea at all (see *PP v Lim Yoo Hock* [1984] 1 MLJ 309 HC). Thus the proviso to the sub-section mandates the court to '... ascertain...' that the requirements laid down therein have been complied with. The court can only ascertain this after being apprised of the facts of the case and it is therefore a necessary corollary of the proviso to set out an outline or a statement of the facts of the case to satisfy the stipulated requirements (see *PP v He King Kiok* [1992] 2 MLJ 781

HC). Its object is to ensure that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him. It is designed not only to ascertain whether admission of the facts amounts to a plea of guilt in law but also to enable the court to form an opinion on the conduct of the accused in assessing the sentence (see *Palan v PP* [1932] MLJ 124 HC; *PP v Nahat Singh* [1939] MLJ 239 HC; *PP v Chean Tin* [1939] MLJ 266 HC; *Tukiran bin Taib v PP* [1955] MLJ 24 HC; *Abdul Kadir bin Abdul Rahman v Public Prosecutor* [1984] 1 MLJ 80 HC; *Lian Kian Boon v PP* [1991] 1 MLJ 51 HC; *New Tuck Shen v PP* [1982] 1 MLJ 27 HC; *Lee Weng Tuck v PP* [1989] 2 MLJ 143 SC). Failure to take evidence or a statement of the facts and record them will result in the conviction being quashed (see *Supramaniam v Kanthasamy* [1956] MLJ 18 HC; *Nadesan v PP* [1966] 1 MLJ 63 HC).

The facts presented to the court after a plea of guilty should be a short summary of the facts of the case. The length of the narrative will depend on the nature of the charge and seriousness of the case. It is not required to be some kind of litany in which the wording of the section of the Act under which the accused has been charged should be faithfully reproduced. It should be confined to facts which the prosecution is able to prove and then only to facts necessary to establish the charge (see *Chen Chong & Ors v PP* [1967] 2 MLJ 130 HC; *Abdul Kadir bin Abdul Rahman v Public Prosecutor* [1984] 1 MLJ 80 HC; *Lian Kian Boon v PP* [1991] 1 MLJ 51 HC). In simple and straighforward cases the outline of the facts is usually done orally but in more involved cases the outline may be in the form of a written statement (see *Mok Swee Kok v PP* [1994] 3 SLR 140 CA). But in cases of doubt or difficulty it may be advisable to have evidence led as to the facts. The course adopted in each case must be left to the court's discretion (see *Chin Ban Keat v R* [1949] MLJ 297 HC; *PP v Abdul Aziz* [1978] 2 MLJ 155 HC). A record of the facts merely as 'facts as in charge' is not sufficient as it does not indicate whether an offence is disclosed (see *Nadeson v PP* [1966] 1 MLJ 63 HC; *PP v Abdul Aziz* [1978] 2 MLJ 155 HC). It is the duty of the magistrate to defer acceptance of a plea of guilty until he has the facts alleged by the prosecution fully before him. Accordingly he should, where necessary, postpone the case to give the prosecution a reasonable opportunity of completing their inquiries and grant bail to the accused if the case is one in which it seems fitting to do so (see *PP v Yang Chen* [1952] MLJ 142 HC).

When recording the facts the magistrate will also have to record the accused's admission or denial of them. The accused's answer on the accuracy of the facts should be recorded (see *Lee Yu Fah & Ors v. PP* [1937] MLJ 179 HC). It is not essential, however, that the accused should admit every iota of facts given by the prosecution. If what he admits contains all the ingredients of the offence and what he disputes or does not admit is irrelevant or immaterial to the offence, such an admission is sufficient and the court should accept the plea (see *Chota bin Abdul Razak v PP* [1991] 3 MLJ 77 HC). The record must show that the magistrate himself read and examined the facts of the case to see whether they were conformable with the law and in support of the charge as the record must speak for itself (see *Ng Song Luak v PP* [1985] 1 MLJ 456 HC). If the facts admitted to do not constitute the offence charged the magistrate will then have to consider whether to discharge the accused or enter a plea of not guilty and proceed to trial (see *Chin Ban Keat v R* [1949] MLJ 294 HC; *Sau Soo Kim v PP* [1975] 2 MLJ 134 FC). In no event should the court acquit the accused if the facts do not disclose an offence (see *PP v Mahmud* [1974] 1 MLJ 85 HC; *PP v Soon Tiew Choon* [1976] 1 MLJ 189 HC; *PP v Mohamed Tarmizi* [1985] 1 MLJ 219 FC).

[15] In *Lee Weng Tuck & Anor v Public Prosecutor* [1989] 2 MLJ 143 at p 147, His Lordship Mohamed Auni SCJ said:

As regards the third safeguard, it is an established practice that on a plea of guilty, the prosecuting officer would supply to the court the statement of facts constituting the offence with which the accused is charged. The statement is then read out and explained to the accused. Unless the accused admits the facts without qualification, the practice is to treat the plea as a plea of not guilty. This safeguard is of the utmost importance in serious cases. In capital cases, we suggest that the statement of facts supplied to the court should first be read by the judge himself to enable him to decide whether the facts alleged amount to an offence as contained in the charge. It is only when he is so satisfied, that the statement will be read out to the accused. If the accused admits the statement with qualification or if his admission is not clear or doubtful, then the court should proceed with the trial.

On the facts and circumstances of the present appeal, we were satisfied that there was a breach of proper safeguards when the plea of guilty of the appellants were accepted. There were grave doubts that the appellants understood the nature and consequences of their plea. Equally, there were grave doubts that the appellants intended to admit without qualification the offence alleged against them.

[16] It is of utmost importance to state that a charge which is framed by the prosecution agency is important to an accused person and therefore it is the duty of the prosecution to ensure that there is sufficient facts to support the charge in the event the accused chose to plead guilty as this will safeguard against injustice and gives some facts to the accused with sufficient certainty the offence which he is alleged to have committed. (See *Mohamed Humayoon Shah* [1874] 21 WR CO 72 at 82, *Aw Yang Kee Chuan Iwn Pendakwa Raya* [1992] 2 CLJ 979, *Public Prosecutor v Leong Yoon Meow* [1953] MLJ xxxv)

[17] In the instant case, this court is of the view that the plea of guilty by the accused was not unreserved, unqualified, unequivocal and unconditional (see *Munandu v Public Prosecutor* [1984] 2 MLJ 82) and the plea ought to have been rejected. At the point when the accused stated that she had consumed only beer and that she was a diabetic and receiving medical treatment, it should have been clear to the learned magistrate that the accused did not understand the nature of her plea, neither did she intend to admit without qualification the offence alleged against her. (See*Lau Eng Teck v Public Prosecutor* [1965] 31 MLJ 34 at p. 35). Further, it is also the duty of the learned magistrate to inform the accused at the time of recording the plea of guilty that upon conviction and the sentence to be imposed as provided by law, the accused has to also undergo a supervision with a Rehabilitation Officer or any police officer for a period not exceeding three years immediately after having undergone the punishment imposed upon her in respect of the offence as the supervision order under s 38B of the Dangerous Drugs Act 1952 which is mandatory. The learned magistrate must explain to the accused the full consequences of her plea of guilty especially when the accused was not represented by counsel at the material time. Unfortunately, it is not shown in the record of proceedings that this mandatory provision was explained to the accused. (See *Petrus a/k Belaka v Public Prosecutor* [1998] 3 MLJ 894 at pp 895 - 896).

SENTENCE

[18] In the instant case, the learned magistrate sentenced the accused to three days imprisonment and to a fine of RM2,000 in default two weeks' imprisonment. For the purpose of clarity it is only appropriate to once again state the offence and the punishable section.

[19] Section 15(1)(a) of the Dangerous Drugs Act, 1952 (hereafter referred to as 'the 1952 Act') provides:

> (a) Any person who consumes administers to himself or suffers any other person, contrary to the provisions of s 14 to administer to him any dangerous drug specified in Parts III and IV of the First Schedule;
>
> shall be guilty of an offence against this act and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years.

Sub-section (2) states:

> For the purpose of this section 'consumes' includes eat, chew, smoke, swallow, drink, inhale or introduce into the body in any manner or by any means whatsoever

[20] It is crystal clear that s 15(1)(a) of the 1952 Act provides the discretion to the court to either sentence the offender to a fine or to imprisonment and not both as graciously conceded by the learned deputy public prosecutor. However, the record of proceedings from the magistrate's court shows that the learned magistrate had sentenced the accused to both imprisonment and fine when the punishable section gives the discretion to the court to pass a sentence of either imprisonment or to a fine and not to both. Therefore, the sentence is illegal and not in accordance to law.

[21] Sentence passed by a magistrate must be within the ambit of the punishable section and according to law. (See *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315 and *PP v Tia Ah Leng* [2000] 5 MLJ 401). In the instant case, the sentence passed by the learned magistrate against the accused to three days imprisonment for an offence under s 15(l)(a) of the Dangerous Drugs Act, 1952 and to a fine of RM2,000 in default of two weeks' imprisonment is not in accordance to law and there is a manifest error in law which ought to be corrected. The learned magistrate with respect seemed to have misread the punishable section and had sentenced the accused to both imprisonment and fine and the punishment cannot be sustained in law.

SUPERVISION ORDER

[22] As for the Supervision order made against the accused to undergo supervision for a period of two years purported to be under s 38B(1) of the 1952 Act, the learned magistrate did not state in the order the date when the supervision shall commence and the date when the supervision is to end although s 38B(1) of the 1952 Act states that the offender shall immediately after having undergone the punishment imposed upon him in respect thereof, undergo supervision by a Rehabilitation Officer. In the instant case, the accused was released from prison on 3 August 2005 after having served the punishment and that she started to undergo the supervision only on 30 September 2005 when she was informed of the supervision order a few days before that date.

[23] Section 38B(1) of the 1952 Act states:

(1) Where a person is found guilty of an offence under s 15, he shall, immediately after having undergone the punishment imposed upon him in respect thereof, undergo supervision by an officer as defined under s 2 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 for a period of not less than two and not more than three years as may be determined by the court.

[24] Section 2(1) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (hereafter referred to as 'the 1983 Act') defines officer as:

'Officer' means any Rehabilitation Officer or any police officer.

[25] This court is of the view that the supervision order which was issued by the learned magistrate on 1 August 2005 should contain both the dates, being the date of commencement and the date of completion of the supervision for reasons first, the conditions contained in the said supervision order has a restraining effect on the offender, in the instant case, against the accused as her liberty is restricted and secondly, the said supervision order which does not contain the dates for the period of two years would result in practical difficulties for the officer to enforce the order and for the accused to strictly comply, and thirdly, it leaves it open to debate, challenge and several interpretation. (See *Public Prosecutor v Ng Hock Lai* [1994] MLJU 251 and *Habib bin Hasan v Timbalan Menteri Dalam Negeri Kementerian Dalam Negeri, Malaysia Dan Yang Lain-Lain* [2004] 6 MLJ 580 at p. 597)

[26] It is important to state that it has been brought to the attention of this court that the decision of this court is likely to determine the rights of a number of other supervision orders and offenders who have been placed in the same dilemma and category as the accused in this case because of the blunders made by some magistrates who have been issuing orders mechanically and without any judicial mind and this makes the issue raised to be given the gravest consideration. In the instant case, the learned magistrate did not seem to have read and explained the terms and conditions imposed by the said supervision order for rehabilitation to the accused and as a result the accused did not report to the rehabilitation officer intended by s 38B(1) of the 1952 Act when she was released after having served the sentence of imprisonment. There is also no record to show if the supervision order was ever served or handed to the accused on 1 August 2005 when the said supervision was issued against the accused. The supervision order dated 1 August 2005 issued by the learned magistrate states as follows:

BORANG 4

AKTA PENAGIH DADAH (RAWATAN DAN PEMULIHAN 1983

(Pindaan) 1998

(Perenggan 6(1)(b) dan subseksyen 6 (2))

PERINTAH PENGAWASAN

Bahawasanya ***Seah Ah Chiew*** Kad Pengenalan No 501205-08-5032 berumur 55 tahun yang beralamat di ***20, Jln. Woo Saik Hong, Teluk Intan, Perak*** (kemudian

dari ini disebut 'orang itu'), adalah diperakui oleh seorang *Pegawai Perubatan Kerajaan/Pengamal Perubatan Berdaftar sebagai **seorang penagih dadah** mengikut pengertian Akta:

Dan bahawasanya **atas syor Pegawai Pemulihan dan setelah memberi orang itu peluang untuk membuat representasi,** saya **Rohaida bte Ishak** seorang Majistret di **Ipoh** memerintahkan orang itu supaya diletakkan di bawah Pengawasan * **Pegawai Pemulihan/Pegawai Polis/Pegawai Polis Tentera/Pegawai Memerintah** selama ** **2 tahun** di bawah syarat-syarat berikut:

(a) Orang itu hendaklah tinggal dalam kawasan **Teluk Intan**;

(b) orang itu hendaklah sentiasa memberitahu pegawai tempat kediamannya dan hendaklah tidak menukar tempat kediamannya atau meninggalkan kawasan tempat kediamannya tanpa kebenaran bertulis Ketua Pengarah;

(c) orang itu hendaklah melapor diri di Balai Polis Teluk Intan; (sebagaimana yang ditetapkan oleh Majistret) tidak lewat dari 72 jam dari tarikh Perintah ini dan pada 1 haribulan setiap bulan antara 6.00 pagi dan 6.00 petang;

(d) orang itu tidak boleh mengambil, mengguna atau memiliki apa-apa dadah berbahaya;

(e) orang itu hendaklah menjalani apa-apa ujian pada bila-bila masa dan di mana-mana tempat sebagaimana yang diperintahkan oleh pegawai; dan

(f) orang itu hendaklah menjalani apa-apa jua program pemulihan dadah yang diadakan oleh Kerajaan.

Diberi di bawah tandatangan saya dan meterai Mahkamah di Ipoh pada 1-8-2005.

(Sgd)

.....

(Majistret)

[27] Form 3 of the Dangerous Drugs (Forms) Regulations 2001 which is in English and the National language is as follows:

P.U (A) 288.

FORM 3

DANGEROUS DRUGS ACT 1952

(Section 38B)

ORDER TO UNDERGO SUPERVISION FOR A PERSON FOUND GUILTY OF

AN **OFFENCE UNDER SECTION 15 OF THE ACT**

WHEREAS.....
Identity Card No:..... Age:.....
Address:.....
(hereafter referred to as 'the said person') has on..... been convicted for an offence under section 15 of the Act by the Magistrate Court at.....

Pursuant to subsection 38B(1) of the Act, the said person shall after having undergone the punishment imposed upon him by the Court undergo supervision by an officer for a period of..... years with effect from..... (not less than two and not more than three years) in accordance with the conditions under subsection 6(2) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 as follows:

(a) the said person shall reside in the area of

(b) the said person must not leave the area where he resides without the written permission of the Director General;

(c) the said person shall report at the..... police station (as specified by the Magistrate), or for a member of the Armed Forces at..... (as specified by the officer), not later than 72 hours after his discharge from the Rehabilitation Centre and on the..... day of every calendar month between the hours of 6am and 6pm;

(d) the said person shall not consume, use or possess any dangerous drugs;

(e) the said person shall undergo such tests at such time and place as may be ordered by the officer; and

(f) the said person shall undergo any programme for the rehabilitation of drug dependants held by the Government.

Given under my hand and the seal of the Court
at.....

Dated..... day of..... 20.....

.....
Magistrate

P.U. (A) 288

BORANG 3

AKTA DADAH BERBAHAYA 1952

(Section 38B)

PERINTAH MENJALANI PENGAWASAN BAGI SESEORANG YANG DIDAPATI

BERSALAH ATAS SUATU KESALAHAN DI BAWAH SEKSYEN 15 AKTA

BAHAWASANYA.....
No. Kad Pengenalan..... Umur:.....
Beralamat:.....
(kemudian daripada ini yang disebut "orang tersebut") telah pada..... disabitkan atas suatu kesalahan di bawah seksyen 15 Akta oleh Mahkamah Majistret di.....

A

Maka menurut subseksyen 38B(1) Akta, orang tersebut, setelah menjalani hukuman yang dikenakan ke atasnya oleh Mahkamah, hendaklah diletakkan di bawah pengawasan seorang pegawai selama tempoh..... tahun mulai..... (tidak kurang daripada dua dan tidak melebihi tiga tahun) mengikut syarat-syarat di bawah subseksyen 6(2) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 seperti berikut:

B

(a) orang tersebut mestilah tinggal di kawasan.....

(b) orang tersebut tidak boleh meninggalkan kawasan tempat dia tinggal tanpa kebenaran bertulis Ketua Pengarah;

C

(c) orang tersebut hendaklah melaporkan din di balai polis..... (sebagaimana ditetapkan oleh Majistret), atau bagi anggota Angkatan Tentera di..... (sebagaimana yang ditetapkan oleh pegawai itu), tidak lewat dari 72 jam selepas beliau dikeluarkan dari Pusat Pemulihan dan pada... haribulan setiap bulan kalendar antara jam 6 pagi dan 6 petang;

D

(d) orang tersebut tidak boleh mengambil, menggunakan atau memiliki apa-apa dadah berbahaya;

(e) orang tersebut hendaklah menjalani apa-apa ujian pada bila-bila masa dan di mana-mana ternpat sebagaimana yang diperintahkan oleh pegawai itu; dan

(f) orang tersebut hendaklah menjalani apa-apa jua program bagi pemulihan penagih dadah yang diadakan oleh Kerajaan.

E

Diberi di bawah tandatangan saya dan meterai Mahkamah
di.....
Bertarikh..... haribulan..... 20.....

F

.....
Majistret

G

[28] This court found several serious and material flaws in the Supervision order dated 1 August 2005 issued by the learned magistrate which are as follows:

(a) The supervision order issued by the learned magistrate has labelled the accused as a 'drug dependant' where there is absolutely no evidence to support this finding from a registered medical officer or a registered medical practitioner who has certified that the accused is a drug dependent and there is also no recommendation of a Rehabilitation Officer as is required for an order made under s 6(1)(b) of the 1983 Act;

H

(b) the supervision order states that the accused has been certified by a Government Medical Officer/Registered Medical Officer to be drug dependent where there is absolute no such documentary evidence produced before the learned magistrate during the proceeding to support this serious accusation which has labelled the accused as a 'drug dependant' and this finding has serious and far reaching consequences in the eyes of her family members, friends and community and leave alone the possible constant harassment by the authorities concerned;

I

(c) the learned magistrate seemed to have been confused, failed to consider and distinguish the supervision order made under s 6(1)(b) of the 1983 Act and the supervision order made under s 38B(1) of the 1952 Act and had misinterpreted the supervision order which is issued pursuant to s 6(1)(b) of the 1983 Act when compared to the supervision order required to be made pursuant to s 38B(1) of the 1952 Act. The supervision order under s 6(l)(b) of the 1983 Act is discretionary and is issued to a person who is found to be a drug dependant as defined under s 2(1) of the 1983 Act where the offender is certified by a government medical officer or a registered medical practitioner to be a drug dependant upon all tests carried out for the purpose of determining whether a person is a drug dependent and upon the recommendation of a Rehabilitation Officer and having given such person an opportunity to make representations (See *Re Roshidi bin Mohamed* [1988] 2 MLJ 193) whereas the supervision order which is required to be issued pursuant to s 38B(1) of the 1952 Act is mandatory and is a consequential order where an accused is found guilty of an offence under s 15(l)(a) of the 1952 Act. It is important to draw a distinction between the two supervision orders, which is made pursuant to s 6(1)(b) of the 1983 Act which is discretionary and the supervision order which is made pursuant to s 38B(1) of the 1952 Act which is mandatory following the conviction for an offence under s 15(l)(a) of the 1952 Act. According to the supervision order dated 1 August 2005 (Borang 4 Condition No c) states that the accused must report at the police station Teluk Intan not later than 72 hours from the date of the said supervision order but in the instant case, the accused is sentenced to three days imprisonment and how is the accused expected to physically report herself at the police station Teluk Intan within 72 hours unlike in Form 3 which expressly states that the accused shall undergo supervision after having undergone the punishment imposed upon her by the court;

(d) In the instant case, the supervision order does not state expressly first, whether the supervision is to be carried out by a Rehabilitation Officer as appointed under s 2(2) of the 1983 Act or a police officer and the accused has not been informed of the same as she has not been handed or served a copy of the supervision order by the learned magistrate on 1 August 2005 and secondly, the terms and condition of the supervision order has not been read and explained to the accused;

(e) the supervision order states that it is issued under s 6(1)(b) of the 1983 Act which rightfully and expressly should have been unde s 38B(1) of the 1952 Act and both the acts provide different set of statutory forms.

[29] Magistrates or any judicial officer for that matter should not pretend to dispose of cases registered in their respective courts in such hurried fashion and by means which is not provided by law and by sacrificing justice to meet the demands of statistics. (See *Public Prosecutor v Hettiarachigae Ls Pereira* [1977] 1 MLJ 12).

[30] The said supervision order which was issued in accordance with the statutory Form 4 under s 6(1)(b) of 1983 Act has become worthless as it not only did not contain proper and correct information with certainty but it provided her with the

A wrong information where a copy of the said order had been forwarded to the Agensi Dadah Kebangsaan. It is important to state and emphasise that it is the duty of the learned magistrate to act with utmost care and accuracy and with a judicial mind so as to afford the person who is ordered to undergo the supervision order under s 38B(1) of the 1952 Act the full rights to which she is entitled especially where the B said order is something affecting her liberty and there ought to be careful consideration to examine the conditions of the order which has some restraint on her liberty. It is also essential and the accused is entitle to know at the outset and at the time when the supervision order is issued upon the conviction under s 15(l)(a) of the 1952 Act the precise terms and conditions imposed upon her where it affects her liberty and not to order in stock form as in the instant case 'over the rubber stamp' C as this is 'undesirable in any judicial proceedings, and most particularly undesirable in proceedings of this nature, as in the instant case, where the liberty and reputation of the subject is involved and in which, consequently, particular individual attention must, as a matter of right, be given to every relevant factor' contained in the supervision order.

D

[31] The learned magistrate had erred in law when she had failed to issue the supervision order pursuant to the correct statutory form as provided by Statutory Form 3 of the Dangerous Drugs (Forms) Regulations 2001 and the conditions contained in the said supervision order cannot travel beyond and outside the E statutory conditions and must be read within the said statutory form. Looking at the said Statutory Form 3 and the purpose which it is to serve, this court cannot doubt that the legislature intended that that form and no other form was to be used.

[32] The only issue is the legality of the supervision order dated 1 August 2005 F issued by the learned magistrate which has deviated not merely from the Statutory Form but the substance as well and whether it can be passed over lightly as being irregular. The supervision order which is issued under s 38B of the 1952 Act is mandatory and therefore where the court proposes to make the mandatory order, it is not only appropriate but most desirable for the learned magistrate to explain or cause to be explained to the accused especially where an accused is unrepresented in the G language likely to be readily understood:

(a) the purpose and effect of the supervision order;

(b)) the consequences that may follow if the accused fails without reasonable cause or excuse to comply with the terms and conditions of the supervision order;

H (c) the length or period of the supervision order;

(d) the date of commencement and the date of expiry of the supervision order which must be spelled out in distinct terms.

I **[33]** It is the respectful view of this court that the date of commencement and the date of expiry of the supervision order has to be expressly stated in the supervision order as provided by the said statutory Form 3 as not only do the technicalities of the law require it but justice requires the serious limitations and liberty of a citizen are not to be subject on an ambiguity or uncertainty. All these material and obvious errors and blunders as found by this court possibly shows the fashion in which

judicial proceedings in some lower courts are conducted and undisputedly it is not carried out judiciously but in a mechanical fashion. The supervision order is something affecting the liberty of the accused and there ought to be careful consideration before an order depriving liberty is made and the accused expects utmost care and accuracy on the part of those who issue orders which affects the liberty of an accused. In other words once the supervision order which was issued is not in compliance with the mandatory statutory requirement, it cannot be denied that there is a risk of prejudice to the accused. Statutory requirement is that the accused should start to undergo the supervision immediately upon serving her sentence and it is now four months since the order was supposed to be effective but is flawed and is it right for this court to direct a fresh order to be issued and backdated to 1 August 2005 and to commence the supervision on 3 August 2005 the date when she was released from prison or to issue a fresh order from today. Infact, it will not make any practical sense, defeat and contravene the statutory requirement as provided under s 38B of the 1952 Act if a fresh supervision order is presently issued. (See *Sivaraman Nair v Menteri Dalam Negeri, Malaysia & Anor* [2000] 7 CLJ 140 which has to be distinguished on the facts and the relevant law applied).

[34] In the circumstances, and in view of the several serious and material flaws in the said supervision order which is defective and where infact it affects the liberty of the accused, this court is of the view that it cannot safely be enforced in law 'as there has been substantial contravention of law and judicial procedure which is essential for the administration of justice'. At this stage, it is important to state that this court has carefully considered the flaws in the Supervision order and found them not to be a mere irregularity, informality or technical breach in the procedure so as to make it unimportant but it is for the sake of avoiding any ambiguity in the said order which would deprive the accused of her liberty and touches on the principles of justice. (See*Imtiaz Ahmad v Ghulamaliple* [1963] SC 382 at p. 400). The supervision order dated 1 August 2005 and the contents when read together cannot be treated as curable irregularity because the substance of the said order itself is invalid as being in contravention of the statutory form as provided and the contents of the said Supervision order is questionable, has substantial effect and is calculated to mislead and invalid. (See s 62 of the Interpretation Acts 1948 and 1967 (Act 388)).

[35] This court wishes to make it clear that the flaws and errors found in the supervision order issued by the learned magistrate is not a technical defect or accidental omission but it affects the substance itself and the risk of prejudice to the accused cannot be ruled out. Therefore, this court cannot just brush aside the complaint as a mere technical but to find it as an invalid order which is not enforceable. The supervision order issued by the learned magistrate is a complete deviation and contrary to the statutory form explicitly provided by law and there is no excuse for the non-compliance and where strict compliance is not observed in the matter which affects the liberty of the accused, the accused is entitle to avail herself even if it is classified as technical defect but nevertheless it invalidates the supervision order dated 1 August 2005 issued by the learned magistrate which certainly has bearing on her liberty. The learned magistrate cannot therefore write into the supervision order which she had issued what the legislature did not write into the statutory order pursuant to the Statutory Form 3 Dangerous Drugs (Forms)

A Regulations 2001 and this court cannot presently extend time and reissue the supervision order and neither can the learned magistrate extend or reduce the period which must start immediately upon the release of the accused after she had undergone the punishment on 3 August 2005 which was imposed upon her in respect of the offence. Looking at the peculiarity of the said Form 3 and the purpose B which it was to serve, this court cannot doubt that the legislature had intended the said Form 3 and no other forms were to be used.

[36] There is also another glaring unsatisfactory feature in the instant case which learned counsel for the accused had raised and complained to this court. The name C of the accused in the charge sheet which has been typed states Chew Beng Lay and the Identity Card number as 631109-08-5564 which does not belong to the accused but however the said name and Identity Card number has been deleted by pen and written as Seah Ah Chiew and the Identity Card number as 501205-08-5032 without any initial and the date of the deletion. The number of the police report which was typed as Pekan Baru Repot 3477/2005 has also been altered and D handwritten to read 3474 without any initial or the date. There is no record to show when this deletions were done, was it done before the charge was read to the accused or after the conviction was recorded or after the sentence was passed or after this court had called for the record of proceedings to be forwarded to this court upon a complaint made on behalf of the accused and all this errors and deletion cast doubt E on the performance of the judicial officer.

[37] In the circumstances, and considering the complaints as a whole, it is the respectful view of this court that where an accused is found guilty and convicted for an offence under s 15A of the 1952 Act, the learned magistrate has no jurisdiction to make an order for supervision under s 6(2)(b) of the 1983 Act and as in Form 4 F of the 1983 Act but only in accordance with the express statutory provision in s 38B of the 1952 Act and in Form 3 of the Dangerous Drugs (Forms) Regulations 2001. Consequently, the learned magistrate had erred in law when she issued the supervision order in Form 4 and pursuant to s 6(2)(b) of the 1983 Act.

G **[38]** On having gone through the notes of proceedings as recorded by the learned magistrate, the plea and the mitigating factors as advanced by the accused before the learned magistrate, the sentence imposed against the accused and the supervision order and considering the submissions made by both learned counsel and learned deputy public prosecutor, this court is satisfied that this is an appropriate case for this H court to exercise its revisionary powers and revise the decision of the learned magistrate in respect of the whole of the decision as there are glaring blunders and errors in law on the conviction, sentence and the supervision order. Accordingly, this court had to intervene and set aside the conviction, sentence and the supervision order in exercise of its revisionary powers provided to this court. The conviction against the accused is quashed, the sentence imposed by the learned magistrate is set I aside and the fine paid be refunded to the accused and the supervision order dated 1 August 2005 is also set aside and cancelled.

[39] As to the application of the learned deputy public prosecutor to order a retrial, this court is of the view that this is not an appropriate case to so order as the accused

had served the sentence of three days imprisonment. On the facts and the circumstances of the instant case, this court would respectfully decline to order a retrial although ordinarily this court acting on revision would quash the conviction, set aside the plea of guilty, record a plea of not guilty and remit the case to the magistrate's court and thereafter it will be up to the learned deputy public prosecutor to decide on the next course of action. (See *Public Prosecutor v Mohamed Tarmizi* [1985] 1 MLJ 219). On the other hand, where the trial court has accepted an imperfect plea the appellant court may quash the conviction and has a discretion to order or not to order a retrial. (See *Tang Hee Hing v Public Prosecutor* [1991] 1 MLJ 402 at p 404). However, on the facts and circumstances of this case, it is not fair for the accused to face another judicial proceedings and there is no order for retrial.

[40] Accordingly, the conviction is quashed, the sentence and the supervision order dated 1 August 2005 is set aside and the fine, if paid is ordered to be refunded to the accused. There is no order for retrial.

Conviction quashed

Reported by Sally Kee